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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 9, 1994

BY MESSENGER

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: Gen. Docket No. 93-252

Dear Mr. Caton:

Columbia PCS, Inc. ("Columbia PCS"), pursuant to comments 47 C.F.R.S. 1.415 and 1.419, Columbia PCS, Inc., hereby submits the attached comments.

Please direct any inquiries concerning this matter to the undersigned.

Sincerely,

John A. Malloy

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FEDERAL COMMUNICATIONS COMMISSION
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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 3(n) and 332	)	GN Docket No. 93-252
of the Communications Act	)	
Regulatory Treatment of Mobile Services	)	

Comments of Columbia PCS, Inc.

I. Background and Preliminary Statement

In its Second Further Notice of Proposed Rule Making, the Commission seeks comment on whether non-equity relationships such as management contracts, resale agreements and joint marketing agreements should be considered attributable interests for purposes of the CMRS ownership rules and, if so, whether the rules should apply differently to designated entities licensed in Blocks C and F of the PCS spectrum.

Given the enormous stakes presented by broadband PCS auctions and the obvious specter of "shams", Columbia PCS urges the Commission to adopt clearer guidelines regarding all forms of the above-mentioned non-equity relationships. Nowhere is this need more pronounced than in the troubled area of management contracts. Columbia PCS views the possibility of ineligible entities securing a broad management contract from a designated entity as opening Pandora's box rather than providing the regulatory certainty needed for capital formation.

In these comments, Columbia PCS will endeavor to provide the Commission a framework to further define a standard for permissible management contracts - contracts which do not result in de facto control by the contractor but which should be treated in all cases as attributable interests. Any management contract that does not satisfy these standards would be viewed as conferring de facto control and would thus be impermissible.

II. Management Contracts

Management contracts are the most troubling type of non-equity relationship for licensees and the FCC alike. Management contracts may cause the greatest dilemma for designated entities in particular due to the acknowledged need of these licensees to procure expertise. A major objective of the FCC'S **Broadband Auction Rules** is to ensure that designated entities become bona fide operators in this emerging industry. The FCC's exemplary decision to establish entrepreneurial bands and provide meaningful discounts to designated entities within those bands is sound policy designed to encourage lasting and bona fide economic empowerment. This policy also fulfills Congress' mandate for a more robust, diverse and competitive telecommunications marketplace. However, a practical concern exists that some new entrants may need access to expertise and resources available from current players in the telecommunications industry. Management contracts address this secondary need but also raise the significant threat of abuse unless clearer guidelines can be established.

A. Permissible Management Contract Relationships Should Include "Sub-Contractors" But Not "General Contractors"

Recent decisions from the Court of Appeals for the District of Columbia applying the FCC's Intermountain Microwave test demonstrate that a brighter line is needed to augment determinations of whether agreements confer *de facto* control to a party other than the licensee.[1/] Columbia PCS offers a practical approach of allowing bona fide "subcontractor"- type relationships (which should be treated as attributable interests, as discussed below) and disallowing relationships that are tantamount to a general contractor role and thereby resulting in a transfer of de facto control.

In running an ongoing business concern, a licensee has many tasks to carry out, which invariably fall into functional areas. These functional areas include strategy, planning, design, construction, sales, marketing, administration, network operations, customer service, etc. The function that integrates all of these activities is generally referred to as the general management function. In an outsourcing arrangement, this integration function is often referred to as the general contractor role.

In order to meet the requirement of a licensee maintaining de facto and de jure control, yet allowing the outsourcing of certain of these operational functions, the Commission should narrowly define permissible management contracts to include contracts for any specific functional task (e.g., construction) that would conform to a practicable definition of a "subcontracting arrangement". On the other hand, the

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[1] / See, e.g., Telephone and Data Systems, Inc. v. Federal Communications Commission, 19 F. 3d 42, 50 (D.C. Cir. 1994). See also, Telephone and Data Systems, Inc. v. Federal Communications Commission, 19 F. 3d 655 (D.C. Cir. 1994).

Commission should disallow any general management/general contractor, strategy or planning functions to be outsourced by the licensee as constituting in an improper transfer of de facto control. In addition, the FCC should require such subcontracts to be priced at fair market value resulting from arm's length negotiations. Without such a condition, the subcontractor can extract value from the licensee through the subcontracting arrangement. For example, such value can be extracted directly by having payment in the subcontracting arrangement tied to the revenues, profits or equity of the licensee, or indirectly through excessive payment terms.

B. All Permissible Management Contracts Should Be Attributable Interests in Determining PCS Spectrum Aggregation and PCS-Cellular Cross-Ownership Restrictions

While the FCC's rules should allow such sub-contracting arrangements to facilitate important FCC and Congressional policies, all such arrangements should be considered attributable interests for purposes of the PCS-cellular cross-ownership and PCS spectrum aggregation restrictions. The Further Notice identified the problem that even if a licensee or applicant retains de facto control of the license, a management agreement still can bestow a competitive benefit upon the management company given that the management company manages or controls other licensees or applicants in the same geographic markets.

The FCC's attribution rules should be triggered by all permissible management contract relationships in determining compliance with the market-specific PCS spectrum aggregation and PCS-cellular cross-ownership restrictions.

Such attribution ensures the emergence of truly competitive markets and lessens the burden to police against the misuse of competitive information. This narrow attribution standard preserves competition in each given market but still allows sufficient flexibility to contract for requisite expertise from companies other than direct competitors.

Unless the Commission implements such attribution rules, there will be no prohibition on a Bell Operating Company or a cellular company which holds a 30 MHz or 10 MHz PCS license in its existing service area from providing management services to competing entities in the same geographic market. Such a result would contravene the policies of both Congress and the Commission for promoting competitive alternatives to existing wireless communications providers.[2/] Further, it would create the opportunity for designated entity "shams" which the Commission's operational test of control was designed to prevent.[3/]

These proposed attribution rules should apply to designated entities and non-designated entities alike.[4/] Although the designated entities have the greatest resource needs, the underlying competitive concerns are equally applicable to all PCS blocks. An overriding purpose of the Omnibus Budget Reconciliation Act of 1993 was to promote the establishment of a more diverse and competitive communications landscape. Permitting large, entrenched players to perform management functions under these types of agreements without any attribution consequences risks improper exchange of

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[2]/ Section 309(j)(3)(B) of the Communications Act of 1934.

[3]/ PCS Auction Rules at ¶ 168.

[4]/ Likewise, designated entities that provide management contracts pursuant to these provisions should be attributed with the licensees' spectrum for purposes of the 10 percent spectrum cap.

competitive information at a minimum and abrogates both the Commission's and Congress' intent.

C. Enforcement Issues

Broadband PCS auctions create significant potential for fronts or "sham" organizations for both designated entities and other applicants/licenses, particularly given the magnitude of the dollars at stake and the complexity of the rules crafted for participation of designated entities. The FCC does not have the resources to police every application nor the operation of each entity. As such, when an applicant/licensee enters into subcontracting arrangements, the Commission should require disclosure of such arrangements in the form of an audited report from a third party certifying the contract meets the proposed definition of subcontracting. All such arrangements should also be disclosed in an applicant's short form and long form license applications or in an independent filing with the FCC if after award of license. Finally, the FCC should retain the right to conduct random audits itself, or through a third party at its discretion, especially where the factual data is insufficient or suspect.

III. Resale

The Notice contemplates allowing a CMRS carrier and/or its affiliates to lease capacity from other CMRS providers, including designated entities, in geographic territories where it would otherwise be precluded from buying a spectrum license. Columbia PCS does not oppose non-attributable resale agreements, provided that such arrangements are entered into after auctions and there is no contractual tie to the revenue, profits or equity of the designated entity. Additionally, the Commission should consider establishing some limit on the amount of capacity available for a single reseller. For example, an entity otherwise ineligible from obtaining additional spectrum in a market should not be allowed to obtain an exclusive "capacity" arrangement, whereby the entity has the right to purchase all excess capacity from a licensee. Such an arrangement could facilitate warehousing of spectrum and could substantially reduce competition in a market. And given that a contract for the total capacity of a licensee could equate to a transfer of de facto control under the guise of a resale arrangement, the Commission must apply strictly its de facto control tests to any such arguments.

IV. Joint Marketing Arrangements

The Notice questions whether a licensee who enters into a joint marketing venture with one or more licensees whose geographic market areas have an overlap of 10 percent of the population should have the interest of the other joint venture licensees attributed to it for purposes of the CMRS cross-ownership rules. The Commission also questions whether the general policy should vary when applied to designated entities.

Columbia PCS believes the details of the underlying relationship of the parties must be understood to address effectively the policy concerns relating to joint marketing arrangements. Given that it is somewhat unlikely for competitors in a given market to enter into such arrangements, Columbia PCS believes that these relationships should be scrutinized under general antitrust guidelines. However, while sales and/or marketing subcontracts should not create per se an attributable interest, such agreements should be reached through arm's length negotiations, priced at fair market value and with no attachment to the revenue, profit, and/or equity of the licensee.

VI. Summary

The Commission should establish -- prior to auction -- clear rules for management contracts, resale, and joint marketing agreements that do not transfer de facto control in order to minimize the likelihood of "sham" applicants/licensees. Columbia PCS believes that the definition of a permissible management contract should be narrow and limited to discrete functional tasks, as described above, and any such contract should trigger the Commission's attribution rules for PCS spectrum aggregation and PCS-cellular cross ownership. Any general contractor role or any other contractual ties to the applicant's/licensee's revenues, profits, and/or equity should be disallowed. Additionally, permissible subcontracting arrangements must be the result of arm's length negotiations and reflect fair market value. The FCC should require audited third party reports at the time of the long form application for such management contracts as well as disclosure at the time of short form applications and reserve the right to audit individual contractual relationships.

Respectfully submitted,

Columbia PCS, Inc.

By: John A. Malloy

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